

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

FREDERICK F. FAGAL, JR.,	:	
	:	
<i>Plaintiff,</i>	:	
	:	
v.	:	CIVIL ACTION
	:	
	:	NO. 3:14-cv-02404-ARC
MARYWOOD UNIVERSITY,	:	
	:	
	:	(JUDGE CAPUTO)
<i>Defendant.</i>	:	
	:	<u>ORAL ARGUMENT REQUESTED</u>

**STATEMENT OF MATERIAL FACTS IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT BY PLAINTIFF**

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Plaintiff Frederick F. Fagal, Jr. (“Fagal”) hereby submits this Statement of Material Facts in Support of his Motion for Summary Judgment.

1. Fagal is a natural person residing in New York State, and he intends to remain there indefinitely. See Ex. 1 at 1 (¶ 2); Ex. 2 at 1 (¶ 2); Ex. 3 at 14:13-19; Ex. 12.

2. Fagal earned a bachelor’s degree in 1968 from Union College in Schenectady, NY, a Master’s degree in Economics from Cornell University in 1971, and a Ph.D. in Social Studies Education from Syracuse University in 1981. See Ex. 3 at 19:18-22:5; Ex. 12.

3. Defendant Marywood University (“Marywood” or the “University”) is a university and a Pennsylvania domestic non-profit corporation located in Scranton, PA. See Ex. 1 at 1 (¶ 1); Ex. 2 at 1 (¶ 1).

4. Fagal became a member of Marywood’s faculty in the fall semester of 1987. See Ex. 1 at 2 (¶ 4); Ex. 2 at 1 (¶ 4); Ex. 12.

5. Fagal attained tenure at Marywood in September 1994. See Ex. 1 at 2 (¶ 5); Ex. 2 at 2 (¶ 5); Ex. 12.

6. Marywood terminated Fagal's tenure and employment on April 3, 2012. See Ex. 1 at 2 (§ 6); Ex. 2 at 2 (§ 6); Ex. 12.

7. In 1992, Fagal signed an "Agreement and Appointment for Full-Time Faculty." See Ex. 1 at 3 (§ 10); Ex. 2 at 2 (§ 10); Ex. 4; Ex. 12. This document states that "[t]he policies and practices listed in the Faculty Manual are agreed upon by the parties hereto." See Ex. 1 at 3 (§ 10); Ex. 4.

8. Fagal and Marywood entered into written agreements for him to serve on the University's full-time faculty for each year between 1992 and 2012. See Ex. 1 at 3 (§ 12); Ex. 2 at 2 (§ 12); Ex. 12. The agreement that the parties entered into for the 2010-2011 academic year is attached as Exhibit 39. See Ex. 12; Ex. 39.

9. As of July 1, 2003, Marywood had a written policy titled "Non-reappointment of Faculty Member." See Ex. 52. That policy states: "Non-reappointment of a faculty member is the right of the President of Marywood University, so long as there is no violation of tenure policies, contractual agreements, or other policies stated in the Faculty Handbook." Ex. 52 at FFF001445.

10. As of February 24, 2006, Marywood had a written policy titled “Employment At-will Relationship with Administrators and Staff.” See Ex. 51. That policy stated, in part: “Some jobs require a contractual relationship with the University, and they have a fixed term of employment.” Ex. 51 at FFF001199. The policy distinguishes between those jobs requiring a “contractual relationship” and others that were deemed to be “at-will.” See Ex. 51.

11. On July 1, 2010, Marywood issued an edition of its Faculty Handbook. See Ex. 1 at 3 (¶ 14); Ex. 2 at 3 (¶ 14). A copy of that Faculty Handbook produced by Marywood in discovery is attached as Exhibits 5(a) and 5(b). See Ex. 5(a); Ex. 5(b). The third page of that Faculty Handbook states: “This handbook is effective with the 2010-2011 faculty letters of agreement.” Ex. 5(a) at DEF3458. The fourth page states, in part: “Policy changes require the approval of the President of the University and, when required, the Board of Trustees. Changes are disseminated by the Secretary of the University. They are effective with formal approval and placement in the Marywood University Policies and Procedures Manual.” Ex. 5(a) at DEF3460.

12. On February 18, 2011, Marywood's president, Sr. Anne Munley, IHM, Ph.D. ("Munley"), approved a revision of the University's "Contractual Agreements with Faculty Members" policy. See Ex. 7. That policy stated that a "Letter of Agreement" is a "binding contract covering a specific period of time and as a vehicle to renew, adjust and/or alter the terms of the original contract regarding appointment, rank, tenure, salary, benefits, etc." Ex. 7. The same policy also stated: "Tenure is a term designating guaranteed continuous appointment to full-time faculty members until retirement." Ex. 7.

13. On April 29, 2011, Munley approved a revision to the University's "Faculty Grievances and Appeals" policy. See Ex. 29. That policy stated that "[g]rievants will not be adversely affected for exercising their right to file a grievance, regardless of outcome" and that "[g]rievants will not be subject to adverse consequences for either initiating a grievance or in presenting evidence on behalf of a grievant." Ex. 29 at FFF000113. It also stated: "Procedures regarding dismissal, suspension, and sanctions of faculty members are in the *Progressive Discipline* policy." Ex. 29 at FFF000109-FFF000110.

14. Also on April 29, 2011, Munley approved a revision to the University's "Violent Acts and Threats" policy, which is attached as Exhibit 53. See Ex. 53. That policy obviously addresses acts of violence, including "aggravated assault." Ex. 53 at FFF001460. It further states that "a Marywood University student, faculty, or staff member in violation of this policy will be subject to University disciplinary policies and procedures up to and including termination." Ex. 53 at FFF001460.

15. In May 2011, Fagal and Munley signed the "Letter of Agreement" attached as Exhibit 6. See Ex. 1 at 4 (§ 15); Ex. 2 at 3 (§ 15); Ex. 6. That document states that Fagal would serve as a tenured Associate Professor from August 22, 2011 to May 18, 2012 and earn a salary of \$76,196.00.

16. Beginning on October 12, 2011, Marywood had the "Progressive Discipline" policy attached as Exhibit E to the Amended Complaint. See Ex. 1 at 7-8 (§ 28) and Ex. E (ECF No. 7-4); Ex. 2 at 5 (§ 28). That policy was not revised again until May 7, 2014. See Ex. 26.

17. The "Progressive Discipline" policy effective on October 12, 2011 stated, in part:

Marywood University endorses a progressive discipline policy designed to promote resolution in a

fair and orderly manner. This policy applies to all faculty members with tenure or whose terms of appointment have not yet expired. Its objectives support the collegial relationships at Marywood University and are directed toward continual institutional improvement. Because the University regards disciplinary action as corrective and not punitive, the policy recognizes personal and professional problems that may be rectified by an informal educational process, as well as serious violations of professional responsibilities implicating possible recommendation for suspension or dismissal.

The policy is intended to provide an effective and flexible means of identifying problem areas, resolving complaints, and preventing repetitive incidents by prompt intervention and assistance. It is designed to accomplish these ends by a series of gradual steps involving strategies such as personal conferences, oral and written warnings, and opportunities for monitored assistance where applicable.

....

Suspension. The faculty member may be suspended by the Vice President for Academic Affairs at any time during the proceedings involving him or her. Suspension is justified if immediate harm to the faculty member or others is threatened by the person's continuance in the faculty position.

....

Dismissal

If remedial actions(s) taken during the suspension does not sufficiently resolve the issues that lead to

the suspension, the university may move towards dismissal of the faculty member.

Ad Hoc Faculty Committee

Faculty members have the right to convene an ad hoc committee in order to appeal either a decision to suspend the faculty member or a decision to dismiss the faculty member.

- Having received a written recommendation for either suspension or dismissal from the Vice President for Academic Affairs, the President of the University sends a written communication to the faculty member, stating with reasonable particularity the basis for suspension or dismissal and offering, if requested by the faculty member within 10 days, to convene a tenured faculty ad hoc committee to consider the matter, to render confidential advice, and thereby to effect a remedy if possible.
- Should the faculty member request a review by an ad hoc committee, it shall consist of three members selected in the following order: (a) one tenured faculty member selected by the person seeking assistance, and (2) two tenured faculty members selected by the Executive Council of the Faculty Senate. The choice of members should be on the basis of their objectivity and competence and of the regard in which they are held in the academic community. The President of the University or his/her delegate has the option of attending the meetings of the Committee. Should a faculty member request that such a committee be convened twice (i.e., once for suspension and once for dismissal), the membership of the committee may be similar or different, a determination which is made by the

President of the University in consultation with the faculty member and the Vice President for Academic Affairs. Normally the committee would make its recommendation within 30 days of being convened.

- The Committee elects its own Chair, who sends the opinion of the committee in writing to the President of the University, copied to the faculty member and to the Vice President for Academic Affairs. If the opinion of the Faculty Committee is that the matter is successfully resolved or that there is no merit to the complaint, a recommendation shall be made to discontinue proceedings. If the problem has not been corrected and reason still exists to question the fitness of the faculty member, the recommendation shall be to either continue a suspension or initiate a formal action toward dismissal.

Ex. 1 at 7-8 (¶ 28) and Ex. E (ECF No. 7-4); Ex. 2 at 5 (¶ 28). The

“Progressive Discipline” policy does not list any explicit exceptions. See Ex.

1 at Ex. E.

18. Marywood does not contend that Fagal was an at-will employee at any time between November 1, 2011 and August 31, 2012. See Ex. 8 at 3.

19. In November 2011, Fagal scheduled a speaker from the Foundation for Individual Rights in Education (“FIRE”) to speak at the

University in connection with one of his courses. See Ex. 1 at 5 (¶ 18); Ex. 2 at 3 (¶ 18).

20. Fagal paid for the FIRE speaker. See Ex. 12.

21. The topic of the FIRE presentation was “Know Your Rights: Free Speech and Thought Reform on Campus,” which was related to Fagal’s teaching of the U.S. Constitution. See Ex. 3 at 57:24-58:10; Ex. 12.

22. Fagal received approval from Marywood to hang posters announcing the FIRE speaker. See Ex. 1 at 5 (¶ 19); Ex. 2 at 4 (¶ 19). Fagal paid for these posters. See Ex. 12.

23. Subsequently, Marywood personnel removed at least some of Fagal’s posters. See Ex. 1 at 5 (¶ 20); Ex. 2 at 4 (¶ 20); Ex. 3 at 84:5-85:7, 86:23-87:3, 113:6-114:5, 120:11-12; Ex. 43 at 51:7-8, 51:24-52:18. Marywood did not provide any notice to Fagal before or after the FIRE posters were torn down. See Ex. 12.

24. Fagal attempted to secure an apology by Marywood as well as reimbursement for the posters that were removed, but Marywood refused these requests. See Ex. 3 at 99:20-23; Ex. 12.

25. On December 9, 2011, Marywood approved a new version of its “Tenure” policy. See Ex. 13. The policy stated:

Tenure is a term designating permanent and continuous appointment for a full-time faculty member. It implies a mutual commitment on the part of the faculty member and the University and cannot be taken lightly. Once tenure is granted, it will be discontinued only for grave reason, which may include moral turpitude, flagrant abuse of academic freedom, or professional incompetence.

Ex. 13.

26. On January 13, 2012, Fagal sent an email from his personal email address to Marywood faculty members about the removal of his posters. See Ex. 1 at 6 (¶ 23); Ex. 2 at 4 (¶ 23); Ex. 9; Ex. 12. In the email, Fagal criticized the Marywood administration for removing his posters and for its weak commitment to free speech generally. See Ex. 1 at 6 (¶ 23); Ex. 2 at 4 (¶ 23); Ex. 9; Ex. 12.

27. Fagal's January 13, 2012 email also contained hyperlinks to two related videos criticizing Munley and several other administrators for ordering or participating in the poster removals and again for a weak commitment to free speech. See Ex. 1 at 6 (¶ 24); Ex. 2 at 4 (¶ 24); Ex. 12.

28. A copy of the first video can be found on the DVD-R at Exhibit 10. See Ex. 10; Ex. 12. A copy of the second video can be found on the DVD-R at Exhibit 11. See Ex. 11; Ex. 12. At no time did anybody at

Marywood ask Fagal to remove the videos from YouTube. See Ex. 12.

However, Fagal did so by February 28, 2012. See Ex. 12; Ex. 63.

29. Fagal's two videos are adaptations of scenes in *Downfall*, a 2004 German-language movie depicting the last days of Adolf Hitler's rule. See Ex. 10; Ex. 11; Ex. 17. Specifically, the scenes adapted by Fagal show actor Bruno Ganz (playing Hitler) chastising several other actors (playing Hitler's lieutenants) over setbacks suffered by the Nazis during World War II. See Ex. 10; Ex. 11; Ex. 17 at 40:32-44:29 and 126:15-129:13.¹ Fagal replaced the English subtitles appearing in these *Downfall* scenes with his own subtitles satirizing the Marywood administration's conduct surrounding the FIRE speaker. See Ex. 10; Ex. 11; Ex. 12; Ex. 17 at 40:32-44:29 and 126:15-129:13.

30. References to *Downfall* parodies have appeared in *BBC News Magazine*, *The Telegraph*, *The Atlantic*, and the *New York Times*. See Ex. 12; Ex. 18; Ex. 19; Ex. 20; Ex. 21; Ex. 22.

31. "Downfall" parodies are very popular on YouTube. See Ex. 3 at 161:9-24. Examples of other "Downfall" parodies appearing on YouTube

¹ The citations corresponding to Exhibit 17 are in the form of minutes:seconds on the DVD.

include: a parody in which NFL Commissioner Roger Goodell (depicted as Ganz's Hitler) is upset upon learning that the New England Patriots continue to win games despite the suspension of quarterback Tom Brady (Exhibit 23); a parody regarding the sub-prime crisis (Exhibit 24); and a parody in which New York Commissioner of Education John King (depicted as Ganz's Hitler) is upset about complaints regarding the Common Core and standardized testing (Exhibit 25). See Ex. 12.²

32. On January 17, 2012, Munley received an email from Alan M. Levine, Ph.D., Marywood's Vice President for Academic Affairs, informing her about Fagal's January 13, 2012 email and videos. See Ex. 33 at 42:22-43:16; Ex. 54 at DEF002418. This was the first time that Munley was made aware of Fagal's January 13, 2012 email and videos. See Ex. 33 at 43:10-

² Plaintiff believes that Exhibits 10, 11, 17, and 23-25—if they are copyrighted works—constitute fair use in this litigation. See 17 U.S.C. § 107; *Bond v. Blum*, 317 F.3d 385, 394-95 (4th Cir. 2003) (use of entire copyrighted work for its evidentiary value in a child-custody proceeding fell within the scope of fair use); *Denison v. Larkin*, 64 F. Supp. 3d 1127, 1133 (N.D. Ill. 2014) (“The House Committee on the Judiciary explicitly listed ‘reproduction of a work in legislative or judicial proceedings or reports’ as an example of a fair use”) (quoting H.R. Rep. No. 94-1476, 65 (1976)); *Stern v. Does*, 978 F. Supp. 2d 1031, 1047-48 (CD. Cal. 2011) (“Reproduction of copyrighted material in litigation or potential litigation is generally fair use....”); *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 638, 2007 WL 2085358 (E.D. Pa. 2007).

15. Munley testified that “suspension was the first thing on my mind.” Ex. 33 at 48:4. Before discussing the January 13, 2012 email and videos with Fagal, Munley “had come to the conclusion that this was – this is something for which the individual concerned should be suspended.” Ex. 33 at 62:16-22.

33. When Plaintiff’s counsel asked Munley whether it occurred to her that Fagal had become a physical threat to himself or others, she testified: “I don’t recall thinking about that in the way in which you’re asking the question.” Ex. 33 at 53:22-54:2.

34. Before meeting with Fagal to discuss his email and videos, Munley and Marywood’s Vice President for Human Resources, Patricia E. Dunleavy, Ph.D. (“Dunleavy”), worked together to create a typewritten list of “talking points.” See Ex. 33 at 69:5-70:21; Ex. 40 at 21:2-16; Ex. 55; Ex. 59. Leading up to that meeting, it was Munley’s plan to suspend Fagal regardless of what was said at the meeting. See Ex. 33 at 73:12-74:7, 75:24-76:8, 77:6-12; Ex. 55 at DEF002898; Ex. 59 at DEF000147.

35. Munley’s “talking points” contain a bullet point titled “Post-Suspension.” Ex. 55 at DEF002898. Directly beneath that bullet point is a

sub-bullet point stating: “Sister recommends termination and prepares notice of charges.” *Id.*

36. To Dunleavy’s knowledge, Levine had no input into the “talking points” document. See Ex. 40 at 30:8-15.

37. At approximately 8:45 AM on January 23, 2012, former Marywood Dean of the College of Arts and Sciences, Michael A. Foley, Ph.D. (“Foley”), visited Fagal’s office as Fagal was preparing for his 9:00 AM class and stated that President Munley was summoning him to a meeting at the same time (15 minutes’ notice). See Ex. 1 at 6 (¶ 25); Ex. 2 at 4 (¶ 25); Ex. 3 at 257:24-258:17; Ex. 12; Ex. 33 at 79:18-80:14; Ex. 40 at 34:15-35:10; Ex. 41 at 7:2-7, 13:19-14:14; Ex. 42; Ex. 43 at 30:3-20, 36:19-37:8.

38. Fagal, Munley, Dunleavy, and Foley—and nobody else—attended the 9:00 AM meeting. See Ex. 33 at 79:6-17. Dunleavy was asked to take notes at the 9:00 AM meeting on January 23, 2012, and she did so. See Ex. 33 at 88:20-23; Ex. 40 at 51:4-17; Ex. 56.

39. At the meeting, Munley asked Fagal whether he posted the two-part video on YouTube. See Ex. 1 at 6 (¶ 26); Ex. 2 at 5 (¶ 26). Fagal acknowledged posting the video. See Ex. 1 at 6 (¶ 26); Ex. 2 at 5 (¶ 26).

Munley asked Fagal to explain his actions, but when he attempted to raise the issue of the poster removals, that topic was not allowed. See Ex. 3 at 265:7-14, 269:3-11; Ex. 12.

40. At the meeting, Fagal also requested that Munley put her questions in writing so that he could craft a response. See Ex. 3 at 265:14-16; Ex. 33 at 120:7-15; Ex. 40 at 45:2-6, 53:20-22, 67:8-10; Ex. 56 at DEF000162; Ex. 57 at DEF000143. Munley did not agree to do so. See Ex. 33 at 106:25-107:14.

41. At the meeting, Munley told Fagal that his employment was suspended effective immediately and that he should return his keys and University identification card. See Ex. 1 at 6 (§ 26); Ex. 2 at 5 (§ 26). Foley testified that Munley told Fagal that he was being “dismissed.” Ex. 41 at 20:2-5. Then Foley testified: “I don’t know if dismissed was the exact word, but that was the – that was the bottom line. He was no longer on the faculty.” Ex. 41 at 21:13-15.

42. Levine was not present at the January 23, 2012 meeting with Fagal and Munley. See Ex. 12. At no time did Levine tell Fagal that he was to be suspended. See Ex. 12. Dunleavy was not aware of any role played by Levine in suggesting that Fagal be suspended. See Ex. 40 at 46:9-12.

43. The January 23, 2012 meeting was the first time that Fagal had heard from anybody in the Marywood administration after he posted the videos. See Ex. 3 at 257:24-258:5.

44. At 2:14 PM on the same day, Dunleavy sent an email to Fagal confirming that he had been suspended and directing him to clean out his University office. See Ex. 1 at 7 (¶ 27); Ex. 2 at 5 (¶ 27); Ex. 12; Ex. 14.

45. At some point after the January 23, 2012 meeting, Dunleavy created a typewritten summary of what she believed occurred at that meeting based on her contemporaneous written notes. See Ex. 33 at 105:23-106:9; Ex. 40 at 64:16-65:8; Ex. 57. Dunleavy and Foley signed off on this summary. See Ex. 40 at 65:21-23; Ex. 41 at 18:18-19:9; Ex. 57.

46. At no time before Fagal's suspension did Marywood personnel tell Fagal that he posed an immediate harm to himself or to others. See Ex. 12. Foley testified that he did not believe that Fagal posed an immediate harm to himself or to others at the time of the January 23, 2012 meeting. See Ex. 41 at 25:18-24.

47. Prior to this lawsuit, Marywood personnel never advised Fagal that his suspension was justified on the ground that he posed an immediate harm to himself or to others. See Ex. 12.

48. Prior to January 23, 2012, Marywood did not provide Fagal with an oral warning, written warning, or any opportunity for monitored assistance relating to the emails and videos referenced in Paragraph Nos. 23 and 24 of the Amended Complaint. See Ex. 12; Ex. 37 at 7; Ex. 38 at 2; Ex. 40 at 121:4-11.

49. At 1:11 PM on January 24, 2012, Frances D. Ferrese, Executive Secretary to Munley, sent an email to Fagal. See Ex. 15. One attachment to the email was a letter from Munley to Fagal dated January 24, 2012. See Ex. 1 at 8 (§ 32); Ex. 2 at 5 (§ 32); Ex. 15 at DEF000166-DEF000167. In that letter, Munley stated that she was “recommending that [Fagal’s] tenure and employment with Marywood be terminated immediately.” See Ex. 15 at DEF000166. Munley’s letter repeatedly references an “agreement” between Fagal and Marywood. See Ex. 15 at DEF000166, DEF000167.

50. In the January 24th letter, Munley provided a “Statement of Charges,” which she was “prepared to send...to a duly appointed faculty committee for review along with the emails and videos you forwarded to members of our community.” Ex. 15 at DEF000167.

51. The end of the second “charge” contained in Munley’s January 24th letter was missing, and therefore it was initially impossible for Fagal to know the full “charges” against him. See Ex. 1 at 9 (¶ 34); Ex. 2 at 6 (¶ 34); Ex. 15 at DEF000166-DEF000167.

52. Prior to Munley’s January 24, 2012 letter, Marywood personnel took no remedial actions to resolve whatever issues they believed had led to Fagal’s suspension. See Ex. 12; Ex. 33 at 110:12-18.

53. Prior to Munley’s January 24, 2012 letter, Levine did not believe that he had made a written recommendation to terminate Fagal. See Ex. 43 at 44:23-46:7.

54. On February 2, 2012, Fagal’s attorney, Jonathan Z. Cohen, Esq. (“Cohen”), sent a letter to Munley advising that Marywood was in breach of its contract and requesting that the University convene two ad hoc faculty committees: one for her decision to suspend Fagal and the other for her recommendation to terminate him. See Ex. 1 at 12 (¶ 48); Ex. 2 at 9 (¶ 48); Ex. 27 at DEF000194, DEF000196. Cohen also advised that the end of the second “charge” in Munley’s January 24, 2012 letter was missing. See Ex. 27 at DEF000195.

55. On February 3, 2012, Dunleavy made a handwritten note regarding a meeting or a telephone conversation that she had had with Munley regarding Fagal. See Ex. 40 at 82:15-83:2; Ex. 60. The note reads, in part: “Progressive Discipline- n/a -.” Ex. 60. Dunleavy testified that she was conveying that progressive discipline was not applicable. See Ex. 40 at 83:7-16.

56. On February 8, 2012, Munley sent a second letter to Fagal. See Ex. 1 at 9 (¶ 35); Ex. 2 at 6 (¶ 35); Ex. 16 at DEF000206-DEF000210.

57. In the February 8th letter, Munley stated again that she was recommending that Fagal’s “tenure and employment with Marywood be terminated immediately” and offered a “Statement of Charges.” Ex. 16 at DEF000206-DEF000210. Once again, Munley’s letter repeatedly referenced an “agreement” between Fagal and Marywood and alleged a “breach” of that “agreement.” See Ex. 16 at DEF000207-DEF000209.

58. In the second “charge” against Fagal, Munley accused him of violating Marywood’s “Civil Rights” policy. See Ex. 16 at DEF000208.

59. At the time of Munley’s February 8, 2012 letter, Marywood had a “Civil Rights Complaint Procedures” policy in effect. See Ex. 1 at 11 (¶ 42); Ex. 2 at 7-8 (¶ 42). A copy of that policy can be found at Exhibit 5 at

DEF3579-DEF3581. The policy stated in part that it “must be followed any time a member of the Marywood University community believes s/he has been the victim of...discrimination, harassment, or assault by any member of the University community.” Ex. 5(a) at DEF3579.

60. Nowhere in Munley’s January 24, 2012 letter or February 8, 2012 letter—or in any attachments to either letter—did she offer to convene a faculty committee to review her suspension of Fagal. See Ex. 15; Ex. 16.

61. Although Munley’s letters of January 24, 2012 and February 8, 2012 reference Marywood’s “Civil Rights” policy and the latter letter charges Fagal with violating that policy, no Marywood employee had filed a civil rights complaint against Fagal after his January 13, 2012 email. See Ex. 12; Ex. 33 at 132:7-12; Ex. 40 at 15:7-10; Ex. 43 at 29:6-12.

62. On February 9, 2012, Marywood’s attorney, William J. Anthony, Esq. (“Anthony”), sent a letter to Cohen. See Ex. 1 at 12 (¶ 49); Ex. 2 at 9 (¶ 49); Ex. 28. In that letter, Anthony stated that Fagal was “not entitled to pick and choose which policies and procedures he believes will suit him best” and that Marywood “had no further contractual obligations to him.” See Ex. 28 at FFF000163, FFF000164. Anthony repeatedly referenced a

“contract” between Fagal and Marywood. See Ex. 28 at FFF000163, FFF000164.

63. On February 17, 2012, Cohen sent a letter to Anthony, which is attached as Exhibit 62. See Ex. 62. Cohen stated in part: “To repeat, Dr. Fagal has elected to convene two separate ad hoc committees pursuant to Marywood’s official policy: one for President Munley’s decision to suspend him and the other, if necessary, for her recommendation to terminate him.” Ex. 62 at FFF001686.

64. On February 22, 2012, Fagal filed a grievance against Munley. See Ex. 1 at 13 (¶ 51); Ex. 2 at 9 (¶ 51); Ex. 12; Ex. 30; Ex. 31. In the grievance, Fagal alleged that Munley violated Marywood policy by improperly suspending him, by improperly moving to terminate his employment and tenure, and by not accepting his request to convene an ad hoc committee to appeal the suspension. See Ex. 30; Ex. 31.

65. On February 28, 2012, Cohen sent a letter to Anthony advising that Fagal had removed the videos that he had posted to YouTube. See Ex. 63. Nobody at Marywood had asked Fagal to remove the videos. See Ex. 12.

66. On March 26, 2012, Erin A. Sadlack, Ph.D. (“Sadlack”), the Chair of Marywood’s Faculty Grievance Committee sent a letter to Fagal summarizing his grievances and concluding: “I now write to inform you that in reviewing each of these grievances, we have found no evidence of improper action on President Munley’s part which would constitute a legitimate grievance.” See Ex. 12; Ex. 35 at 12:22-13:19; Ex. 44.

67. On March 29, 2012, Fagal sent a letter to Munley objecting to the Faculty Grievance Committee’s decision and stating:

I grant permission for Marywood University to release your “Recommendation for Termination and Statement of Charges” dated February 8, 2012 to an ad hoc committee in order to appeal your decision to suspend me as well as your recommendation to terminate my employment and tenure. To be clear, I am requesting that the ad hoc committee be convened twice—once to appeal my suspension and once to appeal your recommendation to terminate my employment and tenure.

See Ex. 12; Ex. 45.

68. On April 2, 2012, Barbara McNally, an assistant for Levine, sent an email to Levine stating that Fagal was on her list of faculty members “leaving” Marywood after that year or leaving their position in the capacity that they were hired. See Ex. 43 at 49:1-19; Ex. 65. Levine testified that he

probably told McNally that Fagal would be leaving. See Ex. 43 at 49:9-12. When Plaintiff's counsel asked Levine, "You thought that before Professor Fagal's disciplinary procedures were over, it was a foregoing conclusion that he would be out of Marywood?", Levine stated: "I thought that was a distinct possibility, yeah." Ex. 43 at 49:13-19.

69. On April 3, 2012, Munley sent a letter to Fagal. See Ex. 1 at 14 (¶ 54); Ex. 2 at 10 (¶ 54); Ex. 12. The letter stated, in part:

Since the grievance process is now complete, I have decided to finalize my recommendation. As a result, your employment with Marywood and your tenure are terminated effective today, April 3, 2012.

Further, to provide you with a review of my decision, I will consider your letter dated March 29, 2012 as your authorization for me to convene two faculty ad hoc committees to appeal my decisions to suspend you and to terminate your employment and tenure. I am doing this despite the fact that on two separate occasions you refused my offer and did not choose to convene an ad hoc committee to review my decision to suspend you and my recommendation to terminate your employment and tenure before I finalized my decision.

Ex. 32; Ex. 33 at 141:17-143:10. Munley's claim that Fagal did not request that the University convene an ad hoc committee to review his suspension was untrue. See Ex. 12; Ex. 27; Ex. 45; Ex. 46 at FFF001686.

70. When Plaintiff's counsel asked Munley whether—prior to her letter of April 3, 2012—any ad hoc faculty committee had made any recommendation regarding her recommendation to terminate Fagal, she testified: “I think the only thing that happened was the response to the Grievance and Appeals Committee.” Ex. 33 at 144:19-25. To Fagal's knowledge, prior to Munley's letter of April 3, 2012, no ad hoc faculty committee had made any recommendation regarding Munley's recommendation to terminate him. See Ex. 12.

71. On April 4, 2012, Cohen sent a letter to Anthony advising that Munley had no right to terminate Fagal prior to considering any recommendation of an ad hoc faculty committee under the “Progressive Discipline” policy. See Ex. 66.

72. On April 30, 2012, Sr. Gail Cabral of Marywood sent the email to Fagal that is attached as Exhibit 58. See Ex. 12; Ex. 58. Sr. Cabral stated:

Sr. Anne Munley and Dr. Levine asked me to respond to your question about the status of the ad hoc committee. The committee has not yet convened but I expect that to take place this week. I am currently working to schedule the meeting.

Your suggestion to include Dr. Ed O'Brien on the committee has been accepted. The other two

members of the ad hoc committee are Dr. Helen Bittel and Mr. Matt Povse. The choice of these two individuals was made in accordance with the Progressive Discipline Policy, on the basis “of their objectivity and competence and of the regard in which they are held in the academic community.”

According to the Progressive Discipline Policy, when a faculty member requests that a committee be convened twice, the President determines whether the membership of the committee is similar or different. The President has received your email, and after review and consultation, Sr. Anne has determined that the membership will be the same.

Ex. 58.

73. On May 6, 2012, Fagal sent an email to Bittel, O'Brien, and Povse attaching a written defense to the charges made by Munley on February 8, 2012. A copy of that email is attached as Exhibit 67. See Ex. 12; Ex. 67. A copy of the attachment is attached as Exhibit 68. See Ex. 12; Ex. 68.

74. On May 17, 2012, the ad hoc faculty committee held a meeting about Fagal's case. See Ex. 47 at 22:9-24:15; Ex. 49. Minutes taken by Bittel about that meeting state, in part: “[W]e concluded that we (the AHC) are charged with reviewing the substance of the termination charge (dismissal and revocation of tenure)....we understand our charge to be the review of substance the termination and denial of tenure charges. We

understand that the issues of suspension and procedure were resolved by the FGC.” Ex. 49.

75. On May 18, 2012, Bittel sent an email to Dunleavy stating: “I just wanted to let you know...that, during yesterday’s meeting, we agreed that our charge should be the review of substance the termination and denial of tenure charges. We understand that the issues of suspension and procedure were resolved by the FGC.” See Ex. 47 at 39:4-22; Ex. 48.

76. On July 2, 2012, the ad hoc faculty committee issued a document titled “Review of Sister Anne Munley’s Decision to Terminate the Employment and Tenure of Dr. Frederick Fagal.” See Ex. 1 at 15 (¶ 59); Ex. 2 at 11 (¶ 59); Ex. 34.

77. The ad hoc faculty committee did not concur with all of the charges lodged against Professor Fagal. See Ex. 34. Nonetheless, the committee concurred with Munley’s decision to revoke the tenure and terminate the employment of Fagal. See Ex. 34. The FSAHHC’s document did not mention Fagal’s suspension. See Ex. 34.

78. Bittel later acknowledged that she did not make any formal findings about whether Fagal’s suspension was appropriate. See Ex. 47 at 31:22-24, 66:12-17. She testified: “Whether Sister Anne was out of line in

suspending him in the first place, that was the other committee because they are responsible for procedural elements.” Ex. 47 at 65:19-21.

79. Bittel also testified that she did not think that Munley had ever informed her that Fagal had asked for an opportunity to answer Munley’s questions in writing. See Ex. 47 at 46:22-47:10. She acknowledged that—had she known that Fagal had asked for that opportunity—that would “problematize” her understanding that Fagal had declined multiple opportunities to make amends, to show remorse, and to explain his actions. See Ex. 47 at 49:19-50:3. Bittel further stated that Fagal’s request to answer Munley’s questions in writing conflicted with her committee’s findings and that these findings could not account for Fagal’s request. See Ex. 47 at 50:12-18, 69:17-70:13

80. Bittel also testified that Munley had asked for the ad hoc faculty committee’s expected date of completion because “she didn’t want it to drag out too long.” Ex. 47 at 50:12-18.

81. On July 6, 2012, Fagal sent an email to the ad hoc faculty committee members objecting that they had not reviewed his suspension and requesting that they do so. See Ex. 12; Ex. 64. The committee did not

reconvene to review Fagal's suspension. See Ex. 47 at 71:14-17; Ex. 50 at 40:7-11.

82. On July 10, 2012, Bittel sent an email to Dunleavy stating, in part:

On Friday afternoon, our committee received a response from Dr. F. He has found several problems/omissions with our report and has asked us to review and resubmit. Mostly he objects to the fact that we did not separately adjudicate his suspension; we, however, understood that this was adjudicated by the prior committee and that their findings were supposed to be final.

See Ex. 47 at 71:20-72:9; Ex. 69 at DEF3733.

83. Members of the ad hoc faculty committee have stated or suggested that their committee did not review Fagal's suspension. See Ex. 47 at 22:7-21, 24:5-10, 29:22-30:10, 39:4-21; Ex. 48 at DEF001749; Ex. 49 at DEF000323; Ex. 50 at 16:10-17:21.

84. On July 13, 2012, Munley sent Fagal a letter stating, in part: "My decision to terminate your employment with Marywood University and your tenure effective April 3, 2012 stands." See Ex. 1 at 16 (¶ 65); Ex. 2 at 11 (¶ 65); Ex. 12; Ex. 35 at 338:4-11; Ex. 36.

85. Between the time that Fagal was suspended and the time that he was terminated, Marywood took no remedial actions directed to him. See Ex. 33 at 112:19-25.

86. On July 18, 2012, Dunleavy sent an email to Munley stating, in part: “I’d like to suggest the following topics for your consideration for Cabinet Retreat....Faculty Grievance and Appeals and Progressive Discipline for Faculty - post Fagal, we probably want to revise these (perhaps using some of the faculty who sat on the review committees).” Ex. 40 at 116:22-117:14; Ex. 61 at DEF002781.

87. Fagal received his agreed-upon salary through August 2012, at which point Marywood ceased paying him. See Ex. 1 at 17 (¶ 66); Ex. 2 at 11 (¶ 66).

88. On May 7, 2014, a new version of Marywood’s “Progressive Discipline” policy took effect. See Ex. 26. Unlike the previous version, this one states:

Progressive discipline, however, is not guaranteed in every instance. In certain rare and extreme cases, the President has the authority to initiate procedures for suspension or dismissal of a tenured faculty member without that person first undergoing progressive discipline.

...

Exceptions to Progressive Discipline

In most cases, it is expected that faculty members will be entitled to the processes of progressive discipline. However, in the rare event of an egregious breach of professional discipline or illegal activity, the President may elect to initiate suspension or dismissal procedures immediately. There is no obligation for the President or VPAA to suspend the faculty member before moving to dismissal procedures given severe circumstances.

Ex. 1 at Ex. E; Ex. 26.

89. On November 2, 2016, Cohen served an expert economic report on Marywood's counsel. See Ex. 70. That report, by the Sobel Tinari Economics Group, states: "With a reasonable degree of economic certainty, based on the information received and the analysis contained in this report, it is our professional opinion that the total present value of the economic loss sustained by Frederick Fagal amounts to...**\$755,395.**" Ex. 70.

Respectfully,

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Date: November 21, 2016

CERTIFICATE OF SERVICE

I, Jonathan Z. Cohen, attorney for Plaintiff, certify that the foregoing document has been filed electronically and is available for viewing and downloading from the ECF system. The following parties have consented to electronic service:

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